



Even though the number of hours of sunshine we are enjoying is reducing as we fast approach winter, there is massive interest in the solar energy market. The Government now provides index-linked Feed In Tariffs (FITs) via the energy supplies to small solar panel installations on what could be the roof of your house or on the top of a block of flats. The user of the panel receives free electricity, or a payment under the tariff for the onward supply to the grid.

Over 25 years, which is the life of most panels, this looks a very attractive proposition. For a limited period through to 5 April 2012 there is a double benefit in that investing in companies operating solar panel installations can be made via the Enterprise Investment Scheme (EIS) or via a Venture Capital Trust (VCT), both of which provide a 30% income tax credit on the amount initially invested. Thereafter both provide either easy exit after three or five years, together with a rising index-linked income stream (typically starting at 5% of gross investment after year 2) should the investment be retained.

This really is too much of a good thing and both EISs and VCTs will cease to qualify where there are FITs after 6 April 2012. There is now a small window of opportunity between now and then to participate in the solar energy boom, even if you do not want to put solar panels on your own roof! The effective latest date to participate is 31 December 2011.

Please contact us if you would like further details of the opportunity and in the meantime, enjoy reading this edition.



by Colin Burns

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## Tax Enquiry Fee Protection Service

The current state of the UK economy has put significant pressure on HMRC to recover additional tax revenue in order to help them meet the growing deficit in the economy. Obviously, one way to achieve this goal is by carrying out additional enquiries into Tax Returns. Enquiries can be more complex than in the past and the costs of responding are consequently higher. From April 2009 the Finance Act 2008 granted HMRC a new raft of investigative and challenging powers. So it is increasingly important for clients to obtain protection against those costs.



We do have considerable expertise in defending clients under enquiry by HMRC and always ensure returns are filed in a manner that should limit that possibility, however, HMRC select thousands of cases a year for random enquiries. If you are selected for a tax enquiry we will naturally aim to settle it quickly and minimise the final tax liabilities. Nevertheless, answering all of HMRC's questions takes time and the enquiry could take several months. As a result the costs to defend you can be significant.

To provide peace of mind, we run a Tax Enquiry Fee Protection Service. The Service is backed by an insurance policy under which we can claim the costs of defending

clients in tax enquiries. HMRC's statistics show that an additional £12 billion was raised from investigations and compliance activities last year and the Government has confirmed that more investigations will be undertaken in the coming tax year. In order to support you we have enhanced our service this year to make sure you are protected against most types of enquiry.

Just recently HMRC has announced that it will investigate up to 50,000 business records, beginning in the second half of 2011. We have recently discovered that these checks have now started and it means that your records could be investigated by HMRC. Our enhanced service will also protect you against this new environment.

Should business clients subscribe to the service, all Directors and Partners will be covered for their personal affairs (as long as Gerald Edelman is the appointed accountant for the Director or Partner and they have no other business which requires independent cover).

You should have received a recent letter from us about our newly enhanced service and if you do not currently subscribe we strongly recommend you consider joining this year. For more information contact Paul Berendt at pberendt@gerald-edelman.com or on 020 8492 5635

# New UK/Switzerland Tax Agreement



by  
David Convisser

...it will allow the UK account holders to retain anonymity.

On 24 August 2011, an agreement to tax undeclared Swiss bank accounts was reached between the UK and Swiss Governments. Although it is anticipated that the agreement will raise much revenue for the UK Government, it will allow the UK account holders to retain anonymity.

UK citizens who hold Swiss bank accounts but already cooperate fully with HMRC and pay their proper taxes will be unaffected by the agreement.

Under the agreement, a one-off levy ranging between 19% and 34% of all assets held in Swiss bank accounts at 31 December 2010 will be withheld by Swiss banks from 2013 and paid over to HMRC anonymously on behalf of their clients. The exact amount of the levy will depend on the age of the account and amounts held over the period since 2003. The levy will cover income tax, capital gains tax, VAT and inheritance tax as well as associated interest and penalties.

There is the option of avoiding the one-off levy by making a full disclosure to HMRC

of the assets held in Switzerland and settling any historic tax liabilities accordingly.

The one-off levy will be accompanied from 2013 by a withholding tax of 48% on interest, 40% on dividends and 27% on capital gains that will be applied to income or gains arising from assets held in Swiss bank accounts.

Non-UK domiciles can opt out of the one-off levy but not the withholding tax and for those non-doms who have not remitted offshore income or gains held in Swiss bank accounts, it would seem preferable to opt out of the levy.

For anyone who may have evaded taxes by using Switzerland, the Liechtenstein Disclosure Facility (LDF) still appears to offer the cheapest route for coming clean and regularising tainted funds in that it offers immunity from prosecution, a limited disclosure period of 10 years and a fixed 10% penalty.



If you decide not to pay the one-off levy and are considering relocating your assets, the agreement means that the Swiss will report you to HMRC

as they will reveal the identities of the account holders as well as the amounts moved and the destination of the funds.

With the rumours that HMRC are turning their attention to funds held in the British Virgin Islands and Panama, many non-domiciled clients will be looking to move their funds to Singapore or Hong Kong so as to avoid the withholding taxes.

At Gerald Edelman, we have extensive experience in dealing with disclosures under the LDF and previous disclosure facilities and we would therefore strongly recommend that you talk to your contact partner if you believe that you may be affected by this agreement.



by  
Richard Kleiner

## Where to Retire Overseas?

It is not surprising that Spain, with its healthy climate and affordable living costs, still remains the most popular destination for Britons wishing to retire overseas. Close behind on the wish list comes Australia, America, France and Ireland. A recent survey conducted by Standard Life shows that France has fallen from second favourite place to fourth due to the fact that property prices have held up better than in other countries and there are therefore fewer bargains to be had.

When considering where to retire overseas, tax will be a key priority. If you become resident in another country, your income will be treated under the tax rules of that country; however, potential emigrants will need to watch out for the new residency test that the UK HMRC plans to introduce from April 2012.

For countries where there are double tax treaties with the UK – which include Spain, Australia, America, France and Ireland – you can apply to your provider of interest/income to get them to stop deducting tax at source on pensions and investments. Such income will then be taxed only in the country where you retire.

Most EU countries have similar tax rates, although France works out cheaper for couples where income is received by one party because allowances can be shared.

There are also big one-off tax pitfalls in certain countries. For example, France and Spain do not recognise the tax free status of a 25% cash lump sum payable on UK pensions. It is therefore worth taking advice and probably encashing your pension before you become resident in such countries.

Set out below is a brief summary of tax and healthcare issues for the top five destinations for retirement:

### SPAIN

#### Tax

Income tax rates are from 24% to 45% in Spain. Capital gains tax is 19% to 21%. Your main residence is exempt from CGT provided the money you recoup is invested in another property. If your pension annuity starts between the ages of 50 and 59, 65% may be tax free, rising to 75% between 60 and 69 and 80% after 69.

Spain has no double tax treaty with the UK for inheritance tax, so take advice on estate planning or risk getting taxed twice.

#### Healthcare

As it is within the EU, you will have access to the Spanish state health system from your UK state pension age, but move before then and you will not be covered.

The marketing manager at Axa PPP Healthcare, suggests that those with poor Spanish may want to opt for an international private medical insurance policy. She said "If you decide to buy a local Spanish policy, the providers of the treatment may not speak English or the insurer may not provide any membership information such as claims forms in English."

## AUSTRALIA

### Tax

Income tax rates start at 12.6% and rise to an effective rate of 45%. There is a nominal 15% tax on pension income. The Australian tax system revalues all your assets from the date you become resident in the country for capital gains tax purposes. Australia has no wealth tax or death duties but you will be taxed on UK income by the UK tax authorities if you have not severed your domicile here.

### Healthcare

Medicare, the Government-funded health plan, is compulsory for all residents, including those who hold permanent resident visas; however, individuals holding temporary resident visas are not covered by Medicare. The UK has a reciprocal healthcare agreement with Australia, which means you will be covered only for emergency medical and hospital treatment.

Axa Healthcare have said: "People moving to Australia aged over 55 will probably not qualify for a permanent visa. They need to show that they will not be a burden on the state welfare or health system, which means they will most likely need to prove they have private medical insurance to apply for one of the many types of visas on offer."

## AMERICA

### Tax

Income tax in America comprises federal tax and state tax. That means your total income tax bill will vary depending on where you live. Federal tax rates start at 10% and rise to 35%.

A couple with income of £50,000 resident in Florida, which has a zero rate state tax, would pay £5,243, making an overall tax rate of 10%. That compares to £6,825 and an overall tax rate of 14% in California, where there is an 8% state tax.

Also consider taking your pension tax-free lump sum before you go, because it is not certain if it is tax free.

### Healthcare

The US does not require expats to buy health insurance but if you don't you face colossal medical bills.

There are a wide range of choices for private cover, but it's not cheap. On the plus side, the technology and facilities are among the best in the world.

Check whether the cover pays 100% of the costs, includes dental and optical costs and if you go to any hospital or clinic or just ones designated by the insurer. Also check whether diagnostic tests and drugs are included as these can be exorbitant in America.

## FRANCE

### Tax

Income tax rates start at 5.5%, rising to a top rate of 41% before the recent move.

An advantage of France for couples moving there, where income is paid to one individual, is that family units are treated together, so two personal allowances can be applied to one income. Nevertheless France does have a wealth tax of 0.55% a year on assets over €800,000 (£709,000), rising to 1.8% for assets over €16.79m. The top rate is set to come down to 0.5% next year though.

### Healthcare

France's national health system is one of the best in the world. Expats over UK state retirement age need to get form E121, acknowledging their long term commitment to remain abroad, to have automatic access. Non-working expats under retirement age need full medical insurance to carry them through to retirement.

## IRELAND

### Tax

In Ireland, tax is paid at 20% on the first €32,800 of income and 41% on the balance. But you also have to pay the universal social charge, introduced this year. This levies 2% on gross income of €4,005- €10,036, rising to 4% on income up to €16,016, and 7% above that, although for those aged 70 and older the universal social charge is capped at 4%.

### Healthcare

People who intend to live in Ireland for one year or more qualify as an ordinary resident and are entitled to healthcare but many opt for private medical insurance instead.

Potential emigrants will need to watch out for the new residency test that the UK HMRC plans to introduce from April 2012.



# Surplus cash in a business ?

We have all been brought up with the notion that 'Cash is King' and for good reason; adequate liquidity is necessary for a long term, stable and successful business. Regular assessment of cash levels is part and parcel of a business's treasury function and cash flow projections will assist in forecasting future levels of liquidity and enabling effective management of the peaks and troughs in a business' cash balance.



by  
Engin Zekia

Holding unnecessarily large cash balances has an 'opportunity cost' associated with it.



Businesses (and individuals) who hold more cash than is needed by keeping excessive or permanent cash balances should carefully consider why they are doing this. Holding unnecessarily large cash balances has an 'opportunity cost' associated with it. Since the surplus cash could be put to alternative uses and by not doing so, the benefit that could be derived from that alternative use is wasted, this being the opportunity cost.

This brief article looks at some of the options available to a business which is in the enviable position of having surplus cash.

## Motive for holding cash

Firstly, back to textbook theory, cash is generally held for 3 reasons:-

1. Transactions – for working capital purposes, to meet the normal day to day finances of a business.
2. Precautionary – to provide a safety buffer for unexpected cash needs.
3. Speculative – to enable a business to take advantage of opportunities in acquiring assets, investments or to undertake expenditure on more favourable terms.

If there is limited or no requirement to hold cash for precautionary or speculative purposes, then alternative uses for the surplus cash include:-

1. to repay existing loans,
2. invest it to generate income and capital growth in that investment, or
3. to distribute the surplus cash to the owner-managers of the business.

## Repay loans

The rate of interest payable on borrowings will be higher than the rate of interest receivable on savings, therefore repaying loans can be an attractive option.

There may, however, be 'hidden' costs in repaying loans early and the potential effect of these should be considered. They may include penalties on repaying a loan before its normal redemption date or an exit fee.

If a loan is repaid, the corresponding reduction in interest charges will increase the profitability (and the tax payable), an increase in investment income will have a similar effect but to a lesser extent.

The reduction or ending of loan repayments will also of course improve future cash flows.

## Investment

Investing the cash may be an attractive option, and the level of returns will improve the longer the period the cash is tied up for; however, before committing the cash to long investment periods, the business' cash flow forecast should be sufficiently rigorous to indicate that the cash will not be required by the business. If there is an unforeseen cash shortage during the investment period, either a penalty will be incurred to enable the cash invested to be accessed, or a loan will have to be taken out, either way, costs will be incurred, which will reduce the effective return of the investment.

Business owners should be aware that by holding substantial investments or earning substantial investment income in their trading companies, they risk losing their entitlement to entrepreneurs' relief, which is a valuable relief available to owners of trading companies. They should seek professional advice before undertaking any major investments.

## Distribute to shareholders

The availability of cash will allow increased levels of pension contributions and dividends, which are generally tax efficient methods of remunerating owner-managers. Genesis Wealth, our Wealth Management division, will be able to advise individuals on how to put such cash to best use, depending on personal circumstances.

As you can see from this brief article, there is no single 'best' recommendation for the use of surplus cash, it depends on individual circumstances.

The important issues to remember are:-

1. be aware of it
2. consider the options available and
3. take professional advice.

# Intellectual property 'IP' – The forgotten Asset



Every company will have some form of IP and too often those assets are neglected or, worse, given away. Intellectual Property falls into a range of categories. Perhaps the most prevalent category is trademarks, the protection available for a company's brand, logo or look.

Technology companies may well often benefit from patent protection which gives broad protection for their technical inventions for up to 20 years. Design protection is available for the appearance of products requiring only a low level of distinctiveness. Many companies also own copyright of, for example, software they have developed and the proprietary images and text in their literature and packaging.

Often this IP is valuable or even essential. The main purpose of intellectual property is to allow a party to prevent others from copying their creation or innovation and the penalties, if IP is successfully asserted, can be severe against a copier – the Courts can issue injunctions and can also force the copier to pay back any damages that the IP owner has suffered because of the copying. Much more sophisticated models of IP value extraction also exist though. A successful brand, for example, can be franchised and the trademark protection forms the corner stone of any such franchise. Innovations can be licensed by way of patent protection to third parties ensuring a royalty stream to the patent owner. In addition the value of a company can be enhanced by including the IP as part of the assets. Increasingly, for example, in the field of patent protection, newly formed companies are able to attract investment on the strength of their patent portfolio.

Protection of IP is often seen as a costly option and there is no question that full patent or trademark litigation can incur large legal costs; however, often the existence of the right itself is enough to dissuade potential copiers or at least form the basis of a useful commercial negotiation. A more realistic assessment of the cost should be based around how much it costs to obtain IP protection rather than necessarily enforce it.

In many cases IP protection effectively exists automatically and without cost. In these cases the important point is to identify where the IP resides within a company and ensure that it is audited and recorded in case it needs to be used. Automatically subsisting rights include copyright which comes into being with the act of creating the copyright material (although it is always best to mark such material with the year, the © symbol and the name of the copyright owner). Design protection can exist automatically within the UK/the EU for limited periods, which can be very useful if clear cut copies of, for example, a distinctive product appears on the market. In fact even if a registered

trademark has not been obtained for a brand, protection may be available through a "passing-off" action if the owner can show that the brand is distinctive and thereby formed a reputation in relation to it. Although it does not necessarily strengthen a case enormously, this is often why unregistered marks are accompanied by the TM symbol.

Some rights, however, can only be obtained by registration or provide an enhanced position if registered. For example in the case of trademarks, if a trademark is registered then in any litigation the owner has to go through fewer hurdles to prove that it deserves trademark protection. The ® symbol can be associated with registered trademarks and can serve as a real deterrent to third parties when they are considering how to brand their competing product or service. Similarly registered design protection is available which is a short cut to showing ownership of the design and also affords longer protection – up to 25 years. Patents can only be obtained through a registration process, principally because the patent monopoly is a very strong and broad one and it is necessary to persuade the authorities – in the form of the local Patent Office – that there is in fact an invention that merits that monopoly.

The cost of any registered protection, therefore, needs to be offset against the value of the product it is associated with and the importance of exclusivity, but should always be an important consideration at the beginning of any creative process even if the decision in the end is negative. Patent protection is the most expensive of the rights available because of the work required in persuading Patent Officers that an invention is there, but the resulting right can be truly powerful and valuable and the question must always be whether the investment is worth it.

So a company may immediately find that it has more IP than it realised. The company name and logo could of course be registrable as a trademark, if distinctive. The company literature and images could well be covered by copyright protection. Any innovation the company has created which they have not made public could still be the subject of patent applications, which could cause real problems for potential copiers, and the external design of products going on to the market could be subject to a limited period of protection automatically and/or registrable. Even for a small sized company an audit of their IP is often a satisfying process!

The Government is committed to increasing the knowledge and use of IP in the UK as it views it as a key driver for growth and many resources are available from the UK Intellectual Property Office, <http://www.ipo.gov.uk>. In addition there are many firms of Patent and Trademark Attorneys specialising exclusively in this area who are highly experienced in advising on and obtaining where appropriate IP protection. If your company feels it may be missing a trick then at least consider an initial discussion which would typically be free.

IP can often be a concealed asset but one that could prove of real value to many companies and you need to make sure that you bring it out of hiding!

This article was kindly contributed by one of our valued professional connections:

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In many cases IP protection effectively exists automatically and without cost.



# A new factor to consider when IHT planning

In the 2011 Budget the Government announced the introduction of a lower rate of IHT for those who leave a charitable legacy of 10% or more of their "net" estate when they die.



by Michael Harris

For deaths occurring on or after 6 April 2012, estates that include charitable legacies of at least 10% of the net estate will benefit from a 36% rate of IHT (compared with the main IHT rate of 40%) on the rest of their chargeable estate.

Whether or not the 10% "charitable legacy" threshold rule has been met will be determined by comparing:

- the total value of charitable legacies for IHT purposes; and
- the value of the net estate for IHT purposes as reduced by:
  - Any available nil-rate band;
  - The value of assets passing to a surviving spouse or civil partner; and
  - The value of assets that qualify for IHT reliefs and exemptions – apart from the charitable legacy itself.

If this 10% test is passed, the estate will qualify for the reduced rate of IHT.

The recently issued consultation paper gives a number of examples of how the relief will work. The first of these examples, set out below, shows how the minimum charitable legacy passes the 10% test.

An estate is valued at £850,000 and the available nil-rate band is £325,000. On the basis that the minimum charitable legacy to pass the 10% test was bequeathed, the positions before 6 April 2012 and from 6 April 2012 would be as follows:

	Before 6 April 2012	From 6 April 2012
Estate value	£850,000	£850,000
Less charitable legacy	- £ 52,500	
Less available nil-rate band	- £325,000	-£325,000
Net estate for 10% test purposes		£525,000
Less minimum charitable legacy to pass 10% test		-£52,500
Taxable estate	£472,500	£472,500
	@40% £189,000	@36% £170,100

While this relief will probably not be of interest to the majority of individuals, those with larger estates may well be interested.

The amount left for distribution to non-charitable beneficiaries, (ie. the estate value less any charitable legacy and IHT due) would be:

	Before 6 April 2012	From 6 April 2012
	£608,500	£627,400

With no charitable legacy, the amount available for beneficiaries would be £640,000 (the estate value less IHT due (£210,000) on the estate). The charitable legacy results in a reduction in the amount left to other beneficiaries of:

	Before 6 April 2012	From 6 April 2012
As a proportion of the charitable legacy	60%	24%

Of course, for individuals who had planned to leave charitable legacies that would pass the test anyway (ie. regardless of this relief) the reduced IHT rate of 36% will represent a genuine "windfall" for the other beneficiaries under the testator's Will.

The consultation document covers the following areas:

- application of the 10% test and the reduced IHT rate and whether the reduced rate should be limited to the free estate or extended to other components of the estate;
- the nature of the legacy including some practical issues around the valuation of assets, types of charitable legacies, claims and avoidance;
- instruments of variation, including notifying charities about legacies; and
- administration issues such as those connected with forms, guidance and Wills.

The consultation ran until 31 August 2011.

While this relief will probably not be of interest to the majority of individuals those with larger estates (and of a philanthropic disposition) may well be interested. Whether the relief acts as an incentive to leave charitable legacies which would not otherwise have been left remains to be seen.

What is clear though is that recovering asset values and the frozen nil-rate band are likely to act as a strong incentive for some to reconsider IHT planning.

When doing so the role that insurance, investment and trust-based solutions can play should not be ignored. Schemes exist to reflect the wishes of most would-be donors in relation to continued access (to any funds given) and control. To the extent that the IHT liability cannot be reduced, it will often be worth considering the role of appropriate life assurance policies issued in trust to meet the liability.

## LONG-TERM CARE: The latest Government report



by Rob Jones

Last month saw the publication of a report into funding the cost of long-term care which had been commissioned by the coalition Government shortly after coming into office. If you have the feeling that this is not the first such report, you would be right.

### Shelf life

A Royal Commission into the same subject was initiated by another relatively new Government – that of Tony Blair – in late 1997. The Royal Commission's report

emerged in 1999 and suggested that the state should meet all personal care costs. Not surprisingly the proposal horrified the Treasury and, as a result, was kicked into the long grass.

Despite this, the issue did not disappear and, over the years, criticism of the vagaries of the care-funding system accumulated. Devolved Government saw the UK's four regions each developing their own approach, with Scotland choosing to offer free care, but England sticking to a strict means-tested system.

In July 2009 the previous Government issued a Green Paper on care costs, a move widely seen as designed to defer difficult decisions until after the election. Once this had been achieved, the paper joined the Royal Commission report on a dusty shelf.

### No shelf space for the new report?

Whether the latest report will suffer the same fate as the other long-term care reviews remains to be seen. The chairman *continued on page 7*

continued from page 6

of the commission which authorised the latest report, the respected economist Andrew Dilnot, has pulled no punches. In his letter to the Chancellor and Health Secretary accompanying the report he said 'The system is in need of urgent reform. There have been many years of debate on how to take this forward; now is the time for action'.

### The proposals

The report's recommendations, which under devolved Government rules would only affect England, are:

- **Contribution Cap.** If you enter care at or after age 65, your lifetime contribution to care costs should be capped at £35,000. A lower figure would apply if you enter care at a younger age. The present regime places no cap on personal contributions which means, as the report notes 'some could spend hundreds of thousands of pounds'. Based on average 2010/11 fee rates, £35,000 would pay for a little under a year's nursing care (at £693 a week) or about 16 months' residential care (at £498 a week).
- **Means Tested Capital Increase.** At present, if you have capital of more than £23,250, you are given no state support beyond the flat rate £108.70 a week for NHS funded nursing care. The Dilnot report proposes an increase in the capital limit to £100,000; however, this increase is not quite as generous as it seems, because you would still be required to make some contribution to the extent that your capital exceeds an

unchanged lower means test limit of just £14,250. Below that figure, the state pays all. Between these limits you would be expected to make a contribution towards your care of £1 a week per £250 of capital above the lower limit – equivalent to up to 20.8% of your capital each year. For example, if you had total capital of £64,250 your contribution would start at £200 a week.

- **Living Costs.** If you enter care, you would also be required to pay a standardised amount to cover general living costs, even if the state is paying your other costs. The commission suggested 'a figure in the range of £7,000 to £10,000 a year', but used £10,000 in its cost calculations. At just under £200 a week, there have already been comments that this sum is too low.
- **Other Benefits.** There would be no change to entitlement to long-term disability benefits, but payment of attendance allowance would stop if the state pays your care costs because you have reached the £35,000 contribution ceiling. Under today's rules attendance allowance is stopped if the state pays because your capital is below the £23,250 limit.

### Government Response

The cost of the proposals would be £2.2bn in 2015/16 rising to £3.6bn ten years later. Given the constraints on spending, the Government's initial response has been sadly predictable: more consultations. It was stated in the report that Spring 2012 will see the publication of a White Paper which will

include the findings of the Commission.

### ACTION

As the report says, 'There is no way of predicting in advance what the (care) costs might be for any one person'. There is currently no insurance cover available for long-term care, other than 'immediate needs' annuities for those just about to enter, or already in care.

For now the strategy is largely about making sure you have sufficient retirement funds.



# The 2006 Companies Act

## What should existing companies do about their Articles?



The remaining provisions of the Companies Act 2006 came into force on the 1 October 2009 and these included the introduction of a new model form of articles of association for private companies limited by shares (with alternative forms for companies limited by guarantee and public limited companies). One of the main advantages of these model articles is that they are simple, straightforward and easy to follow.

It is not a legal necessity to change your articles of association and your company will be able to continue to operate on the constitution set out in your current articles until overridden by any new provisions; however, parts of your articles may no longer be applicable if the Companies Act 2006 has specifically overridden them and any reference that is now made in your articles to the Companies Act 1985 is now replaced by the corresponding section in the Companies Act 2006. Knowing which articles are affected and where the law has been replaced and its corresponding section can be confusing and may be a reason to adopt the new model articles.

In any event, some of the new provisions apply to all companies. One of the most notable of these is that directors under the age of 16 are now prohibited; this applies to all companies irrespective of their articles.

In many cases, provisions will only apply to the extent the company's articles are not consistent with the new rules. For example, the new rules governing electronic communications between companies and their members are subject to any

contrary provision in the company's articles; so any existing provisions will override the new rules. In situations such as this, it may be wise to alter the articles to take advantage of the flexibility offered by the 2006 Act.

It may be the case that companies prefer to keep certain aspects of the old regime; the necessity to hold an AGM is a perfect example of this. The default position of the 2006 Act is that private companies do not have to hold an AGM or present the annual accounts to the members; however, many private companies actually prefer to carry on with an AGM for purposes of transparency even though they do not actually have to.

If your company is relatively small with a fairly long-standing board of directors and shareholders it is probably not so imperative that the new articles are adopted; however, if your company is expanding and moving into new areas of business, increasing its share capital and bringing new directors on board, it might be worth your while to consider revamping the articles as the new provisions may be, in the long run, more suited to an evolving company structure.

Please feel free to contact Pat Hamill, Linda Simons or Yinka Bazuaye in the company secretarial department to discuss the limitations (if any) of your company's existing articles and whether it would be advantageous to adopt the new articles to better suit your business's needs.

by Pat Hamill

In any event, some of the new provisions apply to all companies.

# IRS clarifies US non-domicile tax status

The Internal Revenue Service (IRS) has issued a Revenue Ruling (Revenue Ruling 2011-19) confirming that US taxpayers can claim credit for the remittance basis charge. The IRS decision means that non-dom US taxpayers who are resident in the UK and choose to pay tax on the so-called remittance basis can set the annual £30,000 levied by the UK tax authorities for doing so against their US tax bills. Given that the USA's tax system taxes US citizens and green-card holders on their worldwide income, regardless of where they live, American non-doms living and working in the UK previously ran the risk of being taxed twice on the same income.

According to the Treasury's consultation document on the taxation of non-domiciles, around 5,400 individuals paid the remittance charge in 2008-09. A significant proportion of these are likely to have been US taxpayers.



by  
Colin Burns

- Partners
- Michael Harris LLP
  - Colin Burns LLP
  - Richard Kleiner LLP
  - Neil Summer LLP
  - Bernard Hoffman LLP
  - Howard Wallis LLP
  - David Convisser LLP
  - Deval Patel LLP
  - Stuart Rosenberg LLP
  - Stephen Coleman LLP
  - Ajay Shah LLP
  - Graham W Thomas LLP
  - Engin Zekia LLP

- Consultants
- David Atkinson LLP
  - Michael Fialko FCA CTA

# Directors' Duties

## Another legal decision to be mindful of!!!



by  
Bernard Hoffman

### No light at the end of the tunnel

#### Roberts v Frohlich and another

Onslow Ditchling Limited (Onslow) was incorporated as a special purpose vehicle to buy and develop a single site at Ditchling that had planning permission for 30 industrial units. The development was to be funded entirely by borrowed money and it was proposed that all of the units be sold freehold. The directors of Onslow (Mr. Frohlich and Mr. Spanner) had extensive experience in property development.

The development did not go as planned and, in September 2005, administrators were appointed over Onslow by Frohlich and Mr. Spanner. Following a sale of Onslow's assets by the administrators, there was a shortfall to creditors of approximately £900,000. Onslow was placed into liquidation and the liquidator issued proceedings against Mr. Frohlich and Mr. Spanner alleging that they were liable for:

- misfeasance and breach of duty as directors of Onslow by causing, procuring or permitting the company to commence a development when they knew, or ought to have known, that it was speculative, inadequately funded and bound to fail; and
- wrongful trading in breach of section 214 of the Insolvency Act 1986 (the Act).

The court acknowledged that the development was "speculative", but this was an inherent risk of economic activity, however, Mr. Justice Norris commented "what drove Mr. Frohlich and Mr. Spanner at this stage was wilful blind optimism; the reckless belief that, provided they did not enquire too deeply into the figures ..... something might turn up".

The court held that Mr. Frohlich and Mr. Spanner breached their directors' duties to creditors as they failed to act in what they honestly believed was in Onslow's best interests by:

- obtaining funding on terms that they were aware Onslow could not meet;
- instructing a contractor to undertake works knowing that Onslow had insufficient funding to meet the contractor's costs;
- failing to obtain any sales of the units prior to the completion of the development, which was not only a funding requirement, but essential for the viability of the development; and
- rendering Onslow unable to pay trade creditors who were pressing for payment by failing to obtain supplementary funding.

The directors were also liable for misfeasance on the basis that they failed to exercise reasonable skill and care as, in these circumstances, no reasonable director would have continued with the development given the failure to procure pre-completion sales and the funding issues.

Furthermore, the court held that the directors were liable for wrongful trading under section 214 of the Act as both directors knew, or ought to have known, that from September 2004 (a year before the appointment of administrators) there was no reasonable prospect that Onslow would avoid insolvent liquidation, as at that time Onslow was both cash flow and balance sheet insolvent.

### Comment

This decision serves as a reminder that directors need continually to be mindful of their duties and monitor the position of creditors, particularly if they are directors of a property company engaged in speculative development. 'Wilful blindness' and a hope that things will improve or that 'something might turn up' are not defences to exposure to personal liability in respect of breach of fiduciary duties and wrongful trading.



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